Supreme Court, U.S.
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No. 99-337

In The
Supreme Court of the United States

JANIS SOWERBY, ET AL.
Petitioners,

v.

PREVO'S FAMILY MARKET, INC., ET AL.
Respondents.

Petition For A Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT SPARTAN STORES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September, 1999

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35 pp

QUESTION PRESENTED FOR REVIEW

Are the plaintiffs' state law claims preempted by the Federal Meat Inspection Act, which expressly prohibits states from imposing requirements that are in addition to or different than the federal act?

PARTIES TO THE PROCEEDINGS

Petitioners

JANIS SOWERBY, as Personal Representative of the Estate of Scott Michael Hinkley, Deceased, And KAREN BOULAHANIS, GEORGE BOULAHANIS, Individually and as next friend of Bridgit Boulahanis, a minor, Karen Boulahanis, a minor and Brian Boulahanis, a minor.

Respondents

PREVO'S FAMILY MARKET, INC., a Michigan corporation, I.B.P., INC., a foreign corporation

and SPARTAN STORES, INC., a Michigan corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

RESPONDENT'S STATEMENT OF THE CASE 4

ARGUMENT I

Neither the Circuit Court Nor the Court of Appeals Erred in Determining That the Federal Meat Inspection Act Preempted Any State Law Remedy.

A. The Federal Meat Inspection Act Expressly Preempts Any State Law Tort Remedies Which the Plaintiffs Seek.

B. The Cases Relied on by the Plaintiffs are Irrelevant to this Case 10

ARGUMENT II

The Plaintiffs' Unsubstantiated Exaggerations and Scare Tactics Do Not State a Valid Reason Why this Court Should Grant Petitioner's Writ of Certiorari.

CONCLUSION .....

INDEX OF AUTHORITIES

Cases

_Page

Freightliner Corp. v Myrick, 514 U.S. 280 (1995) 22, 24, 26

Medtronic, Inc. v Lohr, 518 US 470 (1996) 22, 23, 24, 25

Kircos v Holiday Food Center, Inc, 191 Mich App 82; 477 N.W.2d 130 (1991) 7, 11, 13, 15, 16

Ryan v Brunswick Corp., 454 Mich. 20; 557 N.W.2d 541 (1997) 17, 18, 20, 21

Texas Food Industry Ass'n v Espy, 870 F.Supp. 143 (WD Tex, 1994) 11, 13

Statutes

15 U.S.C. §§ 1381 et seq. 25

21 U.S.C. § 300 et seq 22

21 U.S.C. § 678 ..... 10, 14

M.C.L. 289.586; M.S.A. 12.964(6) 5

OPINIONS BELOW

The opinion of the Michigan Supreme Court denying leave to appeal is reported at 591 N.W.2d 38 (1999) and is attached as Appendix F to Petitioners' Writ of Certiorari. The opinion Court of Appeals of the Michigan Court of appeals, which affirmed the trial court's dismissal of Petitioners' claims is reported at 230 Mich. App. 131; 582 N.W.2d 509 (1998) and is attached as Appendix A to Petitioners' Writ of Certiorari. The opinion of the Mason County Circuit Court granting Respondents' Motions for summary Disposition is unreported. The circuit court's opinion is attached as Appendix B to Petitioners' Writ of Certiorari

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JURISDICTION

Respondent agrees with the Petitioners' statement of jurisdiction. The Michigan Supreme Court denied Petitioners' Application for Leave to Appeal on May 30, 1999. The

Petition for Writ of Certiorari was filed within ninety days of the issuance of that order. The jurisdiction in the United State Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with the Petitioners' statement of Constitutional and statutory provisions involved in this matter.

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RESPONDENT'S STATEMENT OF THE CASE

These consolidated cases present tort claims for damages allegedly incurred as a result of consumption of ground beef containing the E. Coli bacteria. In both cases, Petitioners contended that the ground beef at issue was processed by Respondent I.B.P., Inc., sold at wholesale by Respondent Spartan Stores, Inc., and retailed by Respondent

Prevo's Family Market. Petitioners in both cases claimed to purchase the ground beef in mid-July of 1993.

A. Procedural History

Petitioners' cases proceeded in the Circuit Court for the County of Mason, before the Honorable Richard Cooper. Judge Cooper handled both cases on a consolidated basis in view of their common legal and factual issues.

All Respondents moved for summary disposition, arguing that the Federal Meat Inspection Act, 21 USC § 601 et seq, preempted any state law tort remedy. After a hearing on April 22, 1996, the circuit court judge issued an opinion and order on June 25, 1996, granting Respondents' motions. On July 8, 1996, petitioners moved for rehearing, and the circuit court denied that motion by an order entered August 12, 1996. Petitioners appealed to the Court of Appeals by right.

All parties submitted briefs on the federal preemption

issue to the Court of Appeals, and oral argument was heard on January 13, 1998. On June 2, 1998 the Court of Appeals issued a decision for publication which affirmed the ruling of the Circuit Court. From this decision, the Petitioners have filed a Writ of Certiorari.

B. Factual History

These are two product liability cases in which members of two families claim that they ate ground beef which contained a bacteria known as Escherichia Coli 0157:H7 (E. Coli). Apparently in July of 1993 family members from each of the Petitioners' families bought ground meat at Respondent Prevo's Family Market. Allegedly, this meat contained the E. Coli bacteria. Petitioners allege that Kara and Brian Boulahanis suffered from hemolytic uremic syndrome (HUS), and Bridgit Boulahanis suffered pre-HUS as a result of eating this ground beef. Their mother, Karen Boulahanis also allegedly suffered injuries as a result of

eating this ground beef. Plaintiff Janis Sowerby, on behalf of her deceased son's estate, filed a similar suit claiming that her son, Scott Hinkley died as a result of eating ground beef containing the E. Coli bacteria.

Petitioners filed suit against Respondent Prevo's Family Market, Respondent Spartan Stores, and Respondent I.B.P., Inc. The crux of Petitioners' claim is that the meat processed by Respondent I.B.P., Inc., distributed by Respondent Spartan Stores, and sold by Respondent Prevo's Family Market was "adulterated" as defined by the M.C.L. 289.586; M.S.A. 12.964(6) because it allegedly contained the E. Coli bacteria. Petitioners filed suit claiming that the Respondents knew or should have known that the meat contained the E. Coli bacteria, and that the Respondents should have taken measures to prevent its sale or to warn consumers of the possible dangers posed by the meat. The specific claim made by Petitioners was that each Respondent

breached its implied warranty of merchantability and was negligent when it allowed meat containing the E. Coli bacteria to be sold to the Petitioners.

The defense to these claims is very simple. The Federal Meat Inspection Act (FMIA) expressly preempts state law requirements in addition to those made by the FMIA. At the time the meat was purchased, **the E. Coli bacteria was not considered an "adulterant" under the FMIA**. Both the Circuit Court and Court of Appeals have determined that Respondents had no duty to test for or warn the Petitioners of the possibility of E. Coli contamination because such actions were not required by the FMIA. As a result, Petitioners have no cause of action against Respondents.

ARGUMENT I

Neither the Circuit Court Nor the Court of Appeals Erred in Determining That the Federal Meat Inspection Act Preempted

Any State Law Remedy.

A. The Federal Meat Inspection Act Expressly Preempts Any State Law Tort Remedies Which the Petitioners Seek.

The sole issue in Petitioners' Writ of Certiorari is whether the Federal Meat Inspection Act (FMIA) preempts Michigan tort law remedies. The Michigan Court of Appeals, in Kircos v Holiday Food Center, Inc, 191 Mich. App. 82; 477 N.W.2d 130 (1991), explained the three basic mechanisms by which federal law preempts state law.

Preemption can occur if the federal statute expressly preempts state law.

> Congress may, as here, explicitly define the extent to which it intends to preempt state law. The FMIA contains a specific provision expressing Congress' intent that the statute

> and its regulations, in specified areas, have preemptive force over state law.

Id. at 85-86.

Preemption may also occur when the state law conflicts with the federal law. This form of preemption is often called "implied conflict preemption."

> When state law "actually conflicts" with federal law, preemption is also compelled. Such conflict exists when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Id. at 86 (citations omitted).

Finally, preemption may also occur when state law conflicts with federal regulations.

> Moreover, preemption is compelled not only

> when the conflict involves a federal statute, but also when it involves valid federal regulations. Provided that they are reasonable exercises of an agency's duly-authorized discretion and not in conflict with congressional intent, federal regulations have no less preemptive effect than federal statutes.

Id. at 86-87.

> The pertinent part of the FMIA reads:
>
> Requirements within the scope of this chapter with respect to . . . any establishment at which inspection is provided . . . which are **in addition to or different than** those made under this chapter may not be imposed by any State. . . . Marking, labeling, packaging, or ingredient requirements **in addition to, or different than** those made under this chapter

> may not be imposed by any State . . . but any State . . . may, **consistent with the requirements under this chapter**, exercise **concurrent jurisdiction** . . . for the purpose of preventing the distribution for human food purposes of any such articles which are **adulterated** . . . and are outside of such an establishment. . . . [Emphasis added].

21 U.S.C. § 678.

In Kircos, the Michigan Court of Appeals ruled that this section of the FMIA "contains a specific provision expressing Congress' intent that the statute and its regulations, in specified areas, have preemptive force over state law." Kircos, 191 Mich. App. at 86. It is clear from the Kircos case that the FMIA and the regulations necessary to carry-out the FMIA shall have preemptive effect over all state laws. The FMIA clearly forbids the states from imposing

inspecting, marking, labeling, or packaging requirements which are "in addition to or different than" those contained in the FMIA.

Furthermore, it is clear that in 1993, when the Petitioners purchased the meat which allegedly contained the E. Coli bacteria, the USDA did not consider the E. Coli bacteria to be an adulterant under the FMIA. The case of Texas Food Industry Ass'n v Espy, 870 F.Supp. 143 (W.D. Tex., 1994) makes this point perfectly clear. In that case, the plaintiffs challenged the USDA's decision to declare the E. Coli bacteria as an adulterant. This declaration meant that the new testing procedures must be implemented by the meat processing industry. The plaintiffs filed suit on the basis that the decision did not conform with the agency's notice requirements. Ultimately, the District Court determined that the notice provisions were not required and that the agency's decision to declare the bacteria as an adulterant under the

FMIA was valid. Id. at 149.

The District Court in Espy made some findings of facts which help define the issues in this case. First, the Court stated that "**[p]rior to this announcement, the USDA had treated pathogen-contaminated meat as unadulterated under FMIA**." Id. at 145 (footnote omitted). The Court also noted in a footnote that testing for the E. Coli bacteria had occurred for several years, and only now had the USDA determined that the bacteria would be considered an adulterant under the FMIA. Id. at 146 fn 6. From these findings it is clear that the USDA chose not to define meat containing the E. Coli bacteria as adulterated prior to 1994.

The Circuit Court granted the Respondents' motions on the basis that FMIA preempted state law tort claims in this area. In support of this position, the Court relied heavily on Kircos, supra. The facts in Kircos are similar to the case at

hand. The plaintiff brought a breach of warranty and negligence action against the defendant because the defendant allegedly sold the plaintiff some pork which contained trichinae from which the plaintiff contracted trichinosis. Kircos, 191 Mich. App. at 84. As previously mentioned, the Court discussed the types of Federal preemption, and determined that the plaintiff's claims were expressly preempted by the FMIA. The FMIA specifically stated that meat containing trichinae was not adulterated. However, under Michigan law, any meat which contained trichinae would be considered adulterated. The Court concluded:

> "Because the requirements of the Michigan statute are "different than" those under the federal scheme, preemption is compelled. Although Michigan has concurrent jurisdiction for the purposes of preventing the distribution of "adulterated" food,

> trichinae-infected pork is not "adulterated" under the federal act. 21 U.S.C. Sec. 678. Accordingly, we find that M.C.L. Sec. 289.716(a)(5); M.S.A. Sec. 12.933(16)(a)(5) cannot be enforced against either defendant. Because the federal statutory scheme provides that there is no duty to inspect or treat fresh pork for trichinae, plaintiff's warranty claims, which are based on assertions of unreasonable risk, must fail as well."

Kircos, 191 Mich. App. at 87.

In the instant case, the Circuit Court determined that the Kircos case was controlling and applied the rule to the case at bar:

> "Further, this Court is bound by the Kircos ruling that there can be no recovery under state tort law. Because federal law and

> regulation had not in 1993 determined Escherichia Coli to be an adulterant, food retailers and meat packers were not required to test for to treat meat in 1993 for Escherichia Coli contamination. . . . [A]s observed above, the Kircos, case specifically states that this subject area is preempted by federal law and regulation and that a tort claim cannot be utilized to seek recovery."

Appendix B to Petitioner's Writ of Certiorari.

The only difference between the case at hand and Kircos is that in Kircos the USDA made it known that meat containing trichinae was not adulterated. The USDA did not determine that the E. Coli bacteria was an adulterant until 1994. By implication any meat containing the E. Coli bacteria before 1994 was not "adulterated" as defined by the FMIA. Therefore, the meat wholesalers, processors, and retailers

were not obligated to inspect for nor warn the public about E. Coli contamination. Under the ruling in Kircos, in 1993, the state of Michigan could not require, as the Petitioners suggest, that the Respondents test for the E. Coli bacteria nor could the state of Michigan require warning labels. **Logically, these requirements would have been in addition to and/or different than the inspection and label requirements required under the FMIA**. For these reasons the Circuit Court correctly determined that the Petitioners claims are preempted by the FMIA.

The Court of Appeals relied heavily Ryan v Brunswick Corp., 454 Mich. 20; 557 N.W.2d 541 (1997) in order to come to the same conclusion. The Court of Appeals determined that the language in the FMIA "includes an express federal preemption provision." (Exhibit 2, p. 3) The Court went on to conclude:

Based on this language, it is clear that

Congress expressly preempted states from placing any additional or different requirements on meat producers other than those of the federal government. Under Ryan and Martinez, supra, any state tort action based on a theory that adulterated meat was distributed must therefore be based on the standards that are identical to federal standards.

Plaintiffs contend that their tort claims are not preempted by federal law because neither Congress nor the USDA adopted regulations concerning the presence of E. Coli bacteria in meat products until 1994, the year after plaintiffs purchased the tainted meat in this case.

*****

In Ryan, supra, p 35, the Supreme Court made it clear that when a federal agency "has deliberately concluded that regulation is not appropriate in a given area, federal inaction will preempt state law not identical to it." That principle applies here. As previously noted, until 1994, the USDA did not consider E. Coli to be an "adulterant." Therefore, the Department did not consider it necessary to inspect for E. Coli and allowed the distribution of E. Coli-contaminated meat. . . . **This intentional decision, not to regulate the presence of E. Coli bacteria in the meat purchased by plaintiffs in 1993 would run contrary to the USDA's then-existing determination that inspection for E. Coli bacteria was not required.**

(Exhibit 2, p 4) (emphasis added)

The Petitioners entire argument is based on the fact that up until 1994, the USDA had not "declared" the E. Coli bacteria to be an adulterant. The Petitioners claim that the USDA's "silence" implies that the USDA did not "make" any regulations regarding E. Coli as an adulterant, and therefore, any state law defining E. Coli as an adulterant would not run contrary to any USDA regulations. This argument is contradictory to this Court's ruling in Ryan. This Court, in Ryan, determined that "[a] decision not to regulate does not automatically invoke preemption, but may carry the force of positive enactment." Ryan, 454 Mich at 35 (footnote omitted) This Court went on to conclude:

> This is not to say that inaction indicated preemption, but rather that "'[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without

> controls, *then* the preemptive inference can be drawn - - from federal inaction alone, but from inaction joined with action."

Id. at 35-36 (citations omitted).

Despite Petitioners' arguments to the contrary, this Court's holding in Ryan is directly applicable to the case at hand. The USDA's decision not to include the E. Coli bacteria as an adulterant was clearly an intentional, reasoned determination. The Court of Appeals determined that "[j]ustification was that the painstaking microscopic inspection of meat for pathogens such as E. Coli and salmonella was not feasible and not warranted when any bacteria would be destroyed by the consumer upon proper preparation and cooking of the meat." (Exhibit 2, p 4) The Court of Appeals was convinced that the inaction by the USDA was an intentional decision not to make E. Coli an "adulterant," and therefore, any state law contrary to this

determination would be preempted. Therefore, the Court of Appeals did not err when it relied on the Ryan decision.

B. The Cases Relied on by the Petitioners are Irrelevant to this Case

The Plaintiff relies heavily on the United States Supreme Court cases of Medtronic, Inc. v Lohr, 518 US 470 (1996) and Freightliner Corp. v Myrick, 514 US 280 (1995). However, neither of these case is on point with the case at hand.

In a nut shell, Medtronic involved a claim for personal injuries allegedly caused by a defective pacemaker lead. The suit was filed in the Florida state court and was later removed to the Federal District Court. The defendant claimed that the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 300 et seq, preempted the plaintiff's state law claim. The Court disagreed and found that the plaintiff's claims were not preempted. However, Court's reasons for not preempting the

plaintiff's claims are not applicable to this case.

First, the Supreme Court's decision was based on the fact that the Food and Drug Administration (FDA) has a broad power when determining when the FDCA will preempt state law. The Court noted that the FDA regulations specifically state that preemption does not occur unless the FDA enacted a regulation on that very same subject as the state law or unless there is an unavoidable conflict between the federal law and the state law. Medtronic, Inc.

Already, Medtronic is different than the case at hand in that the FMIA and its regulations, do not require the USDA to expressly rule on the very issue on which the state has ruled. As previously discussed, under the FMIA, the absence of a regulation can be interpreted as regulation on an issue. Therefore, Petitioners reliance in a federal statute which by its own regulations is to be interpreted more strictly is inapplicable to the case at hand.

Furthermore, the Court in Medtronic, Inc. determined that the plaintiff was allowed to bring a state law claim which the plaintiff would have been able to bring under the violation of the federal statute. In the case at hand, Petitioners do not have a federal cause of action. The determination that the E. Coli bacteria was an "adulterant" was not made until a year after the Plaintiff purchased their meat. Therefore, at the time the injury occurred, Petitioners did not have a federal cause of action. Petitioners have filed a state law claim for an injury which has no federal law remedy. These facts are significantly different than the facts in the Medtronic, Inc. case.

The Petitioners also rely on the United States Supreme Court decision in Freightliner Corp v Myrick, 514 US 280 (1995). In that case, the plaintiffs filed suit alleging that the absence of antilock braking systems (ABS) on tractor-trailers manufactures by the defendant constituted a design defect. The defendants argued that such a claim was preempted by

the National Traffic and Motor Vehicle Safety Act of 1966 (the Safety Act), 15 USC §§ 1381 et seq.

In that case this Court determined that the Safety Act and its regulations did not preempt the state law cause of action. The Safety Act specifically limits its preemption to situations where the federal regulations expressly address an issue. This is similar to the Medtronic, Inc. holding. The Court concluded that at the time of the accident, the regulation pertaining ABSs and stopping distances was effectively suspended by a previous Court decision. Therefore, the Safety Act did not expressly address the issue of stopping distances, and therefore, the state law claim was not preempted.

The defendants argued that the Safety Acts silence on the issue can constitute actual regulation. However, the Court stated that there was no evidence that "Congress intended to centralize all authority over the regulated area in one decision

maker: the Federal Government." Id. at 286. However, as previously discussed, the FMIA specifically states that a state can not make any requirements "in addition to or different than" the requirements set forth under the FMIA. Clearly, the claim brought by the Plaintiff seeks to impose requirements in addition to those already placed on the Respondents. Therefore, the Freightliner case has no bearing on this case.

II. The Petitioners' Unsubstantiated Exaggerations and Scare Tactics Do Not State a Valid Reason Why this Court Should Grant Leave for Appeal.

Petitioners, in their first argument, claim that the Court of Appeals decision will have the unintended effect of jeopardizing the health and safety of Michigan Consumers. This argument is clearly made for the sole purpose of "scaring" this Court into granting the Writ of Certiorari. The Petitioners apparently believe that the Michigan people will

not be able to hold meat processors, distributors, and retailers liable for state law claims for new pathogens which may be harmful.

What the Petitioners fail to realize is that they are barking up the wrong tree. The FMIA specifically states that it preempts the state laws in this area. The Court of Appeals merely followed this federal law. The states do not have the power to make requirements in addition to those made by the FMIA or its regulations.

The Petitioners claim that "[t]hese Petitioners are the **only** victims of E. Coli 0157:H7 poisoning in the United States to be denied any tort remedy." (Petitioners Application for Leave to Appeal, p 10) However, **Petitioners have failed to cite one case in which a victim injured prior to 1994 by the E. Coli bacteria was allowed to recover from the meat distributor.** Basically, the Petitioners have failed to cite any cases in which the preemptive effect of the FMIA was not

enforced.

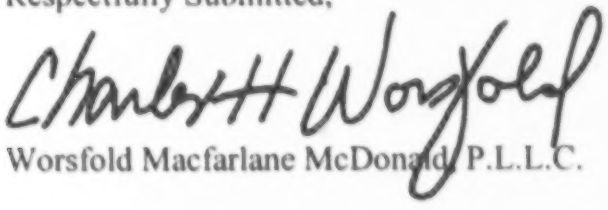
Petitioners exaggerate their claim by comparing this case to the "Jack -in-the-Box" cases which occurred in the early 1990s. However, the Circuit Court in this case already distinguished this case from those cases. The Circuit determined that in the Jack-in-Box cases, the restaurants were being held accountable for failing to properly cook the meat, not for the bacteria in the meat.

The Petitioners have failed to provide any valid reasons why this case should be heard by the United States Supreme Court. The only issue in this case is whether the FMIA has preemptive effect over state law tort claims when it comes to the E. Coli bacteria. Petitioners have failed to provide any cases which show that the FMIA does not have preemptive effect. Furthermore, this Court should not be swayed by the Jack-in-the-Box cases and scare tactics raised by the Petitioners because they have no relevance to this case.

CONCLUSION

For the foregoing reasons, Respondent Spartan Stores, Inc. respectfully requests that this Court deny Petitioners' Writ of Certiorari and/or affirm the Michigan Court of Appeals' ruling.

Respectfully Submitted,



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